No. 16-1435

In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, *et al.*,
Petitioners,

v.

JOE MANSKY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Justice and Freedom Fund ("JFF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Eighth Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Minnesota has enacted a content-based statute restricting core political speech. Minn. Stat. § 211B.11(1). This law cannot withstand even minimal constitutional scrutiny, regardless of forum classification. There are several serious flaws.

First, the statute and the Election Day Policy promulgated by election officials both contain wildly imprecise language. Unlike *Burson v. Freeman*, 504 U.S. 191 (1992), which limited "campaign" activities (*id.* at 193-194, quoting Tenn. Code Ann. § 2-7-111(b)), Minnesota sweeps in boundless "political" expression, whether or not related to the current ballot. Such imprecision grants officials discretion to place roadblocks in the path of voters who express viewpoints they dislike.

Second, the rights of *voters* are the chief reason for campaign restrictions at the polls. The Tennessee statute in *Burson* restricted a particular class of speakers—campaign workers, not voters. Instead of protecting voters, Minnesota's regulation infringes their rights, both to vote and to express themselves in a peaceful, non-disruptive manner.

Finally, this case is about *passive*, non-verbal expression (t-shirts, buttons), not the *active* expression at issue in *Burson* (distribution of campaign materials or solicitation of signatures). There is only a tenuous link between the Minnesota regulation and the intimidation, coercion, and election fraud that polling restrictions are designed to prevent.

ARGUMENT

I. THE STATUTE IS A CONTENT-BASED RESTRICTION ON CORE POLITICAL SPEECH THAT GRANTS EXCESSIVE DISCRETION TO OFFICIALS AND CREATES AN UNREASONABLE RISK OF VIEWPOINT DISCRIMINATION.

Like the statute at issue in *Burson*, Minn. Stat. § 211B.11(1) "implicates . . . central concerns in our First Amendment jurisprudence," including the "regulation of *political* speech . . . based on the *content* of the speech." *Burson*, 504 U.S. at196 (emphasis added). Political speech is unquestionably at the core of the First Amendment. "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). "[D]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

The government may not restrict speech because of "its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Minnesota has enacted an admittedly "content-based regulation because it only prohibits badges, buttons, and insignia with a political message." *Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112, 1120 (D. Minn. 2011). It applies to all viewpoints but censures "an entire topic"—political speech. *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537

(1980); *Burson*, 504 U.S. at 197; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2223 (2015).

A. The Statute Is Imprecise, Granting Officials Broad Discretion To Determine What Is "Political" And Turn Voters Away.

In today's politically polarized atmosphere, legislators must guard against overstepping constitutional bounds. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Minnesota's broad regulatory scheme is a prime example of the imprecision that characterizes many state laws regulating speech at the polls. It sweeps in benign, passive expression. Instead of choosing "a less drastic way of satisfying its legitimate interests," Minnesota has enacted "a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973).

Virtually all states apply some restrictions around polling places. Terminology varies. Many use the word "electioneering," but definitions and breadth vary widely.[2] Some states, as in *Burson*, use the term

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[2] Ar. Code Ann. § 7-1-103(a)(9)(A); Del. Code Ann. tit.15, § 4942(d) (includes wearing items referring to "issues" or "partisan topics," and "political discussion of issues" as well as candidates or "partisan topics"); D.C. Code § 1-1001.10(b)(1)(2)(A); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. § 5/17-29(a) ("electioneering or soliciting of votes or engaging in any political discussion"); 10 Ill. Comp. Stat. § 5/7-41(c); Ind. Code Ann. § 3-14-3-16 (extends to clothing, buttons); Iowa Code § 39A.4(1)(a)(1); Md. Elec. Law Code

"campaign."[3] Other states, like Minnesota, employ the term "political."[4] A few of these states utilize both "campaign" and "political."[5] Other states use more general language,[6] or even loitering laws.[7]

Ann. § 16-206(a)(10); Neb. Rev. Stat. § 32-1524(2); N.M. Stat. Ann. § 3-8-77A; N.Y. Elec. Law § 8-104; Okl. Stat. tit. 26, § 7-108; Or. Rev. Stat. § 260.695(2) ("electioneering need not relate to the election being conducted"); 25 Pa. Cons. Stat. Ann. § 3060(c); Utah Code Ann. § 20A-3-501(2)(a) (oral, printed, or written); Wyo. Stat. § 22-26-113 ("any form of campaigning"); Wis. Stat. § 12.03 ("any activity which is intended to influence voting at an election").

[3] Ar. Code Ann. § 7-1-103(a)(9)(A); Me. Rev. Stat. tit. 21-A, § 682; D.C. Code § 1-1001.10(b)(1)(2)(A); Fla. Stat. § 102.031(4); Ga. Code Ann. § 21-2-414(a); Haw. Rev. Stat. § 11-132(d); Kan. Stat. Ann. § 25-2430(a); La. Stat. Ann. § 18:1462(A)(3); Md. Elec. Law Code Ann. § 16-206(a)(10); N.H. Rev. Stat. Ann. § 659:43(I); N.M. Stat. Ann. § 3-8-77A; N.C. Gen. Stat. § 163A-1134; Ohio Rev. Code § 3501.35(A)(1); S.C. Code Ann. § 7-25-180; S.D. Codified Laws § 12-18-3; Tenn. Code Ann. § 2-7-111(b)(1) (upheld in *Burson*); Vt. Stat. Ann. tit. 17, § 2508; Va. Code Ann. § 24.2-604(D); Wyo. Stat. § 22-26-113 (also regulates "electioneering").

[4] Alaska Stat. § 15.56.016(a)(2)(B); Fla. Stat. § 102.031(4); N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104 ("political banner, button, poster, placard"); N.C. Gen. Stat. § 163A-1134; R.I. Gen. Laws § 17-19-49; S.C. Code Ann. § 7-25-180; Vt. Stat. Ann. tit. 17, § 2508.

[5] Fla. Stat. § 102.031(4); N.C. Gen. Stat. § 163A-1134 (campaign literature and political advertising); S.C. Code Ann. § 7-25-180 (campaign literature and political posters); Vt. Stat. Ann. tit. 17, § 2508 (campaign literature and political materials).

[6] Conn. Gen. Stat. § 9-236(a); Mass. Gen. laws ch. 54, § 65; Mich. Comp. Laws § 168.744(3) ("post, display, or distribute" any material that "directly or indirectly makes reference to an election, a candidate, or a ballot question"); Miss. Code Ann. § 23-17-55

Some states—but not Minnesota—use broad terms like "political" or "campaign" but restrict the reach of their statutes to the candidates, political parties, and measures that are on the ballot.[8] These criteria help curb the potential for unbridled discretion.

The bare term "political," without a limiting definition or other guidance, is highly susceptible to improper discretion. The District Court admitted to "the potential for innumerable issues to become political . . . because of an ongoing national debate, local controversy, or relevance to an issue or candidate on the ballot." *Minn. Majority*, 789 F. Supp. 2d at 1128. The statute "does not include a definition of political" (*id.* at 1125) yet the court determined it was "easily understood" and "not vague" (*id.* at 1126). Definitions for "political badge, political button, or other political insignia" were left to election judges, who drafted an Election Day Policy using examples they admit are not all-inclusive:

("unlawful . . . to distribute or post material in support of or in opposition to a measure" within the defined area); Rev. Code Wash. (RCW) § 29A.84.510(1).

[7] Code of Ala. § 17-9-50; Iowa Code § 39A.4(1)(a)(1); Ohio Rev. Code § 3501.35(A)(1); W. Va. Code § 3-1-37(a).

[8] Alaska Stat. § 15.56.016(a)(2)(B) ("political"); Ar. Code Ann. § 7-1-103(a) (9) (A) ("campaign"); Ar. Code Ann. §§ 16-411(H), 16-515(I); Cal. Elec. Code §§ 18370, 319.5; Colo. Rev. Stat. 1-13-714(1); Conn. Gen. Stat. § 9-236(a); Kan. Stat. Ann. § 25-2430(a) ("campaign"); Me. Rev. Stat. tit. 21-A, § 682 ("campaign); Mo. Rev. Stat. § 115.637(18); Mont. Code Ann. § 13-35-211(3); Nev. Rev. Stat. § 293.740; N.D. Cent. Code § 16.1-10-06 (prior version of this statute was found too broad in *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012)); R.I. Gen. Laws § 17-19-49 ("political").

- Any item including the name of a political party in Minnesota, such as Republican, DFL, Independence, Green, or Libertarian parties.
- Any item including the name of a candidate *at any election*.
- Any item in support of or opposition to a ballot question *at any election*.
- *Issue oriented material* designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
- Material promoting a *group with recognizable political views* (such as the Tea Party, MoveOn.org, and so on).

Id. at 1118 (emphasis added). The possibilities are endless. These "vague limiting construction[s] . . . give [election] officials alone the power to decide in the first instance whether a given activity is [political]." *Bd. of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 576 (1987). Does "any election" include past and/or future elections? Would "group[s] with recognizable political views" sweep in religious or other organizations with convictions about contentious issues like abortion? What about satire, or past political slogans slightly altered ("Make America ____ Again")? Such lack of clarity "compel[s] the speaker to hedge and trim" (*Thomas v. Collins*, 323 U.S. 516, 535 (1945)), perhaps by wearing plain clothing with no messages, lettering, pictures, or even colors that might identify a political party or ideology. Even when voters display lettering unrelated to any political issue or campaign, there can still be confusion. In 2012, poll workers in Colorado and Florida banned student voters wearing Massachusetts Institute of Technology (M.I.T.) sweatshirts, confusing "M.I.T." with candidate Mitt

Romney. James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 Mercer L. Rev. 331, 332 n. 5, 366 n. 270, 367 n. 271-273 (Winter 2014).

Minnesota's use of the term "political" contrasts with Tennessee's use of the more limited word "campaign" in the statute this Court upheld in *Burson*. That statute provides in relevant part:

> Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of *campaign* posters, signs or other *campaign* materials, distribution of *campaign* materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.

Burson, 504 U.S. at 193-94 (emphasis added) (quoting Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)). This Court emphasized that *Burson* was a "rare case." *Id.* at 211. It does not support a ban on voters wearing "political insignia" to the polls. *See Minn. Majority v. Mansky*, 708 F.3d 1051, 1061-62 (8th Cir. 2013) (Shepherd, J., dissenting). As this Court explained, "[w]hether individuals may exercise their free speech rights near polling places [under the Tennessee statute] depends entirely on whether their speech is related to a political *campaign*." *Id.*, quoting *Burson*, 504 U.S. at 197 (emphasis added). Moreover, as Justice Stevens observed in his dissent, the Tennessee statute "silences all campaign-related expression, *but allows expression on any other subject*: religious, artistic, commercial speech, *even political debate and solicitation concerning issues or candidates not on the day's ballot*." *Minn.*

Majority v. Mansky, 708 F.3d at 1061-62 (Shepherd, J., dissenting), quoting *Burson*, 504 U.S. at 223 (Stevens, J., dissenting) (emphasis added). Commentators have noted the potential abuse inherent in the term "political material" as contrasted with "campaign material," including "the name of a religious school" or common phrases such as "God Bless America," "Live Free or Die," and "Support Our Troops." *Freedom of Speech & Election Day*, 65 Mercer L. Rev. at 346 n. 120, 121. Even the colors red and blue, associated with the two major political parties, could be swept in. *Id.* at n. 122.

The broad language of Minnesota's Election Day Policy also captures "issue oriented material designed to influence or impact voting," with the "Please I.D. Me" buttons as an example. "Issue advocacy conveys information and educates." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007). But "what separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.*, at 499 (internal citations and quotation marks omitted). Candidates and issues are often intertwined, and "laws targeting political speech are the principal object of the First Amendment guarantee." *Id.* at 494. The blurred line between political and issue advocacy "is an indictment of the statute, not a justification of it." *Id.* Adding "issue oriented material" to the list of prohibitions only heightens the constitutional flaws.

B. Forum Analysis Does Not Salvage The Statute.

Challenges to Election Day speech restrictions often turn on the nature of the forum. Litigants are more likely to succeed in a public forum. "The Constitution abhors the misuse of discretion as a license for arbitrary procedure. . . . . None of the training manuals give a precise definition of 'electioneering.'" *Reed v. Purcell*, 2010 U.S. Dist. LEXIS 121207, *9 (D. Ariz. 2010) (public forum) (granting temporary restraining order). In a nonpublic forum, challenges are more likely to fail, e.g., *Marlin v. D.C. Bd. Of Elections & Ethics*, 236 F.3d. 716, 718 (D.C. Cir. 2000) (nonpublic forum) (unsuccessful challenge to Board's broad definition of "political activity").

But forum analysis is not conclusive and may not be the best approach in this case. *See, e.g., Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 97 (1st Cir. 2004) (Tortuella, J., dissenting), citing Laurence H. Tribe, *American Constitutional Law* § 12-24, at 988 (2d ed. 1988) (deeming "public forum classifications . . . unnecessary and unhelpful" in challenges to content-based restrictions). Even in cases involving nonpublic fora, a policy that does not provide sufficient criteria to prevent viewpoint discrimination generally will not survive constitutional scrutiny:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups *either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by*

> *selective enforcement of an extremely broad prohibitory statute.*

Cox v. La., 379 U.S. 536, 557-558 (1965) (emphasis added). Minnesota has enacted a "broad prohibitory statute" that should be ruled unconstitutional regardless of forum classification.

Burson held that the Tennessee statute "bar[red] speech in quintessential public forums." *Burson*, 504 U.S. at 197. In a public forum, the government has an uphill battle to justify speech restrictions, but may enact reasonable time-place-manner regulations. Minnesota's restriction applies for a short time in a small space, so at first blush it may appear to fall within that framework. But because it is content-based, it cannot qualify even if the space is a nonpublic forum. "[T]his approach . . . would require some expansion of (or a unique exception to) the 'time, place, and manner' doctrine, which does not permit restrictions that are not content neutral (§ 2-7-111 prohibits only electioneering speech)." *Id.* at 216 (Scalia, J., concurring). In *Burson*, the majority agreed that the statute was "not a facially content-neutral time, place, or manner restriction." *Id.* at 197.

Discretion per se is not "constitutionally fatal." *Minn. Majority*, 789 F. Supp. 2d at 1126, citing *Ridley*, 390 F.3d at 93 ("mere fact that a regulation requires interpretation does not make it vague"). In a nonpublic forum, discretion "must be upheld so long as it is reasonable in light of the characteristic nature and function of that forum." *Id.* at 95 (internal quotation marks omitted); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323-24 (Fed. Cir. 2002) (selectivity and discretionary access are "defining characteristics of

non-public fora"). But viewpoint discrimination is impermissible in any forum, and "[w]hen a statute sweeps more broadly than is warranted by the evil at which it aims, a concern arises that the legislature . . . has created an excessively capacious cloak of administrative or prosecutoria[l] discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991). Here, the statute "applies to all political material, regardless of viewpoint" (*Minn. Majority*, 708 F.3d at 1057), but underlying this facial neutrality is a weapon inviting officials to favor (or disfavor) particular viewpoints. In *Ridley*, officials rejected religious advertisements based on a policy that prohibited "demeaning or disparaging" content. *Ridley*, 390 F.3d at 74. Such a policy creates a wide loophole for officials to censure viewpoints they dislike. This Court recently struck down a similar weapon on First Amendment grounds—the "disparagement" provision of federal trademark law. *See Matal v. Tam*, 137 S. Ct. 1744 (2017).

The Federal Circuit observed that no case in this Court suggests the doctrine of unbridled discretion is "applicable outside the setting of a public forum," and there is thus "no accepted framework" to evaluate such a challenge in a nonpublic forum." *Griffin*, 288 F.3d at 1321-22. But "several cases from [other] circuits[] have struck down standardless licensing schemes in nonpublic fora." *Id.* at 1323. *See, e.g., Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991) (invalidating Florida scheme giving unfettered discretion over placement of newspaper racks in highway rest areas). Unfettered discretion poses constitutional risks in any forum.

The Minnesota statute is also "not a licensing system allowing the regulation of speech in a public forum." *Minn. Majority*, 789 F. Supp. at 1128. That is a common context where unbridled discretion is condemned—but certainly not the only context. "A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that impinge upon fundamental rights." *Schall v. Martin*, 467 U.S. 253, 306–307 (1984) (Marshall, J., dissenting). It is particularly relevant to content-based regulations. This Court recently noted the possibility of "a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services." *Reed v. Town of Gilbert*, 135 S. Ct. at 2229 (content-based sign code subject to strict scrutiny). The trademark provision this Court invalidated in *Matal v. Tam* gave the government carte blanche to render a "moral judgment[] based solely and indisputably on its moral judgment[] about the mark['s] expressive content." *In re Tam*, 808 F.3d 1321, 1338 (Fed. Cir. 2015). Here, Minnesota empowers election officials to deny the fundamental right to vote to prospective voters whose outward apparel displays a disfavored political view.

II. THE STATUTE IMPEDES THE RIGHTS OF VOTERS INSTEAD OF PROTECTING THEM.

This case is principally about the rights of *voters*—their right to vote and their right to political expression. The state interests at stake are designed to protect those rights. The wide discretion granted to Minnesota officials risks infringing them:

> Although the state may adopt "reasonable and uniform regulations" regarding the "time and mode of exercising" the right to vote, that "afford[s] no warrant for such an exercise of legislative power, as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself."

Yick Wo v. Hopkins, 118 U.S. 356, 371 (1886), quoting *Capen v. Foster*, 29 Mass. 485, 489 (1832).

A. The Rights Of *Voters* Are Paramount—The Right To Vote And The Right To Political Expression.

It is vital to distinguish voters, candidates, campaign workers, poll workers, and other election participants. Although the government has "a compelling interest in securing the right to vote freely and effectively" (*Burson*, 504 U.S. at 208), it is the *voter* who holds that right, as well as the right to choose when, where, and/or if to express political views. Perhaps voters would be wise to avoid outward signs of political affiliation at the polls, but that is an individual choice. No voter should be turned away or prosecuted for engaging in the passive expression Minnesota prohibits.

In Minnesota, election judges were instructed not to turn away voters who failed to cover their political paraphernalia, *but* "their names and addresses would be recorded and referred 'to appropriate authorities.'" *Minn. Majority*, 789 F. Supp. 2d at 1118. Voters face an untenable choice—either sacrifice the right to vote or the right to expression. Neither option is constitutionally acceptable. The right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. at 370. Freedom of expression is equally important, "especially expression of political views, [which] ranks near the top of the hierarchy of constitutional rights." *Cohen v. California*, 403 U.S. 15, 24 (1971).

The rights of *voters* are primarily at stake in Minnesota, not the rights of others involved in elections. Sometimes the rights of candidates are also impacted by this type of statute. This Court described *Burson* as "a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote – a right at the heart of our democracy." *Burson*, 504 U.S. at 198. But the action in *Burson* was not filed by a *voter* whose rights were infringed, but by a *candidate* for office. *Id.* at 194. It was a candidate's "right to engage in political discourse" that hung in the balance. The Tennessee Supreme Court observed that the statute regulated "a certain category of speakers, campaign workers." *Freeman v. Burson*, 802 S.W.2d 210, 213 (Tenn. 1990).

Candidate rights are important, but they do not coincide perfectly with the rights of voters. In *Burson*, there was an impact on last-minute campaigning, especially for "candidates with fewer resources,

candidates for lower visibility offices, and grassroots candidates." *Burson*, U.S. 504 at 224 (Stevens, J., dissenting). Areas near the polls may serve as "a forum of last resort" for these candidates. *See Hill v. Colorado*, 530 U.S. 703, 763 (2000) (Scalia, J., dissenting). At the same time, this Court observed there was ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud—evils that the state legitimately seeks to reduce. *Burson*, U.S. 504 at 207. In this case, the concern is not about candidate rights, but solely about what *voters* may wear to the polls.

Past elections reveal a multitude of voters having trouble gaining access to the polls because of what they were wearing. Kimberly J. Tucker, *Article: "You Can't Wear That To Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 82-83 (Fall 2006). The author described her own frustration at the Virginia polls in 2004, where she was asked to remove her John Kerry button and even threatened with arrest when she initiated a conversation about the First Amendment. *Id.* at 61. In Virginia, instructions varied from county to county, with some calling for removal of buttons (*id.* at 83 n. 197-198) and others considering it a "matter of free speech" (*id.* n. 199-200). Voters in South Carolina were told to remove their pro-Bush buttons in the polling area. *Id.* at 83 n. 194. Voters in both Florida[9] and New

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[9] http://www.wptv.com/news/region-c-palm-beach-county/palm-beach/palm-beach-family-says-they-faced-trouble-at-the-polls-for-wearing-trump-shirts (last visited 12/27/17). Florida law does not explicitly prohibit such apparel.

Mexico[10] faced extra hurdles at the polls when they showed up for the November 2016 election wearing Trump shirts. One woman trying to vote in Austin, TX in 2012 was compelled to cover her "Vote the Bible" shirt in order to vote.[11] Even shirts "reminiscent of a party" – "I Miss Bill" – were censured at Arkansas polls in 2016.[12] Adding to the confusion, non-political paraphernalia is sometimes mistaken for campaign material—Dallas Cowboys apparel in Texas when a stadium-finance issue was on the ballot and Denver Broncos items in Colorado when a stadium tax issue was on the ballot. *Id.* at 84. Even more bizarre, a voter in Houston, TX in 2008 almost lost her ability to vote because she wore a souvenir Alaska shirt that was misconstrued as support for Sarah Palin.[13]

These examples are all about *voters*—not aggressive campaign workers trying to secure votes or seeking signatures for a new ballot measure. It seems strange, and blatantly unconstitutional, that a policy meant to

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[10] http://nbc4i.com/2016/10/25/woman-not-allowed-to-vote-because-of-trump-shirt/ (last visited 12/27/17). New Mexico limits "electioneering" but does not expressly forbid wearing buttons, shirts, or similar items.

[11] http://nation.foxnews.com/war-religion/2012/11/01/woman-forced-cover-vote-bible-t-shirt-polls (last visited 12/27/17).

[12] http://5newsonline.com/2016/11/07/what-can-you-bring-to-a-polling-place-cellphones-political-t-shirts-children/ (last visited 12/27/17).

[13] http://www.chron.com/neighborhood/cyfair-news/article/Houstonian-wearing-Alaska-T-shirt-nearly-denied-a-1789897.php (last visited 12/27/17).

protect voters would be used to impede their access to the polls.

B. The State's Interests Are Subservient To The Rights Of Voters.

Several important state interests have been advanced to justify campaign-free zones in areas immediately surrounding the polls:

- "the right of . . . citizens to vote freely for the candidates" (*Burson*, 504 U.S. at 198)
- "the right to vote in an election conducted with integrity and reliability" (*id.* at 199)
- "protecting voters from confusion and undue influence" (*id.*)
- "preventing voter intimidation and election fraud" (*id.* at 206)
- "protect the integrity and reliability of the electoral process itself" (*Anderson v. Celebrezze*, 460 U.S. 780, 788, n. 9 (1983) (collecting cases))
- "maintain[ing] peace, order, and decorum" at the polls (*Mills v. Alabama*, 384 U.S. 214, 218 (1966))

All of these important state interests are designed to serve the voters and protect their right to vote freely and peacefully when they go to the polls. Voters also have the right to be fully informed as they cast their ballots. Although elections should be conducted in an orderly manner, this Court held that the state does not have a legitimate interest in insulating voters from Election Day campaigning. *Mills v. Alabama*, 384 U.S. at 219 (overturning conviction of newspaper editor who violated ban on election day editorial endorsements).

Minnesota's regulation of apparel and buttons does not fit the state's legitimate interests. As Judge Shepherd put it in his dissent:

> I fail to see how this broad restriction, which prohibits a voter from wearing any political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot, would rationally and reasonably help maintain the "peace, order, and decorum" of the polling place, "protect[] voters from confusion or undue influence," or "preserv[e] the integrity of [Minnesota's] election process."

Minn. Majority, 708 F.3d at 1062 (Shepherd, J., dissenting). The connection between the regulation and the interests served is tenuous at best. It is hardly disruptive to the election process for a voter to quietly approach the ballot box wearing a shirt or button an official deems "political," according to Minnesota's nebulous standard. The state may not unnecessarily restrict constitutionally protected liberties even in pursuit of legitimate interests. *Anderson v. Celebrezze*, 460 U.S. at 806. The infringement is even more egregious where the state pursues illegitimate interests. *See Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004) (500-foot buffer zone around polling places was facially overbroad where the evidence suggested the government intended to cut off all electioneering speech rather than to prevent voter intimidation and corruption).

Under narrowly defined circumstances, depending on the place or the government's role, it may be

appropriate to limit political expression—even on clothing or accessories. It may depend on the place, and often other rights or legal doctrines are implicated:

- Courtroom - *Berner v. Delahanty*, 129 F.3d 20, 27 (1st Cir. 1997) (upholding trial judge's order for attorney to remove political button in the courtroom, which must be an absolutely fair and neutral environment)
- Political Rally - *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996) (upholding ban on wearing pins for opposing candidate [Clinton] at a political rally [Bush]) (implicates rights of association)
- VA Medical Centers - *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1314 (Fed. Cir. 2008) (rejecting unbridled discretion challenge to ban on "demonstrations" at VA Medical Centers in light of the need "to maintain a place of healing and rehabilitation for veterans")
- National Cemeteries - *Griffin*, 288 F.3d at 1324-1325 (veterans denied right to display Confederate flag in national cemetery because the government had reasonable discretion to ensure preservation of the commemorative functions of national cemeteries) (implicates government speech)

Sometimes the government does not act as a regulator, but assumes another role:

- Employer - *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) (upholding restriction on political expression of state employees during

working hours, including political buttons and bumper stickers)

- Editor - *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (candidate debate) (editorial discretion to restrict debates to candidates who received objective support from the public)
- Editor for Dept. of Defense Publications - *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008) (rejecting vagueness challenge to political ad ban in DOD publication) (implicates government speech)

Polling places are a unique environment. While some restrictions on active campaigning may be needed to preserve an orderly process for voters, Minnesota's broad ban on political apparel tends to imperil the rights of voters rather than protecting those rights.

C. The Passive Speech Of Voters Is Not An Appropriately Targeted Evil.

Minnesota appears more concerned about voters who might be intimidated by the mere sight of a button or t-shirt on another voter, rather than voters who may be turned away from the polls because of the passive expression on their clothing or accessories:

> The Court concludes that prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of "maintain[ing] peace, order, and decorum" at the polls.

Minn. Majority, 789 F. Supp. 2d at 1124 (following a discussion concluding that the Tea Party is "political" and the "Please I.D. Me" pins might confuse voters).

This conclusion is astounding in light of the passive nature of t-shirts, buttons, and similar items. Clothing is a means of communication protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15 (t-shirt containing offensive expletive). This Court has warned that a complete ban on a species of communication "can be narrowly tailored . . . only if *each activity within the proscription's scope* is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (upholding residential picketing ordinance) (emphasis added). Unlike the ordinance in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which punished only disruptive conduct around schools in session, Minnesota punishes passive, peaceful expression without any evidence of disruption, coercion, undue influence, intimidation, fraud, or similar results. This is contrary to "our system, [where] undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 508 (1969). Just as the students in *Tinker* did not surrender their First Amendment rights at the school gate, "*voters do not surrender such rights at the polling room door.*" *"You Can't Wear That To Vote"*, 32 T. Marshall L. Rev. at 81 (emphasis added).

Many states have either enacted "button" laws or applied broad statutes to prohibit passive expression.[14] Some of them include language that would limit government discretion, such as restricting the prohibition to candidates or measures on the ballot.[15] Unfortunately, a few courts have upheld these restrictions on passive expression. The Fifth Circuit upheld Louisiana's "total ban on politicking," including "buttons and T-shirts," within a 600-foot radius of the polling place. *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993). In Michigan, a district court upheld a directive allowing election inspectors to ask Michigan voters to remove campaign buttons or cover up clothing bearing a campaign slogan or candidate's name, while admitting that "the wearing of political paraphernalia is speech protected by the First Amendment." *AFSCME, Council 25 v. Land*, 583 F. Supp. 2d 840, 847 (E.D. Mich. 2008). The D.C. Circuit upheld regulations

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[14] Cal. Elec. Code §§ 18370, 319.5; Del. Code Ann. tit.15, § 4942(d) (includes items referring to "issues"); 3 D.C.M.R. § 708.8 (Board regulation applied statute to apparel); Ind. Code Ann. § 3-14-3-16; Kan. Stat. Ann. § 25-2430(a); Me. Rev. Stat. tit. 21-A, § 682(3); Mich. Comp. Laws § 168.744(3); Minn. Stat. § 211B.11(1); Mont. Code Ann. § 13-35-211(3); Nev. Rev. Stat. § 293.740; N.H. Rev. Stat. Ann. § 659:43(I); N.J. Stat. Ann. § 19:34-19 (may not display, sell, give or provide badge, button, or other items to be worn); N.Y. Elec. Law § 8-104(1); R.I. Gen. Laws § 17-19-49; S.C. Code Ann. § 7-25-180; Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

[15] Cal. Elec. Code § 319.5; Kan. Stat. Ann. § 25-2430(a); Me. Rev. Stat. tit. 21-A, § 682(3) (expressly allows small buttons with longest dimension not to exceed 3 inches); Mont. Code Ann. § 13-35-211(3); Nev. Rev. Stat. § 293.740; R.I. Gen. Laws § 17-19-49; Tex. Elec. Code § 61.010(a).

promulgated by Board of Elections that prohibited wearing political paraphernalia inside a polling place. *Marlin*, 236 F.3d. at 718.

It is particularly disturbing to observe the broad discretion granted to officials in the Michigan and D.C. cases, even in the absence of an express statutory prohibition on apparel. In states like Minnesota, where the statutory language has no limiting criteria, the law potentially allows election officials to deny the vote to persons whose button or t-shirt is unrelated to any current candidate or ballot issue. Any group with "identifiable political views" could include a religious group or other association with strong views about current issues. Some of the most controversial "political" topics of modern times have significant moral and religious implications for voters.

Passive political expression is not tantamount to the active campaigning at issue in *Burson* and other cases. Distribution of campaign materials *to* voters, or actively soliciting their signatures, is hardly comparable to passive expression *by* voters. "[S]uch silent speech does not present the harmful effects that active campaigning creates on a voter's right to be free from interference." "*You Can't Wear That To Vote*", 32 T. Marshall L. Rev. at 80. The Sixth and Eleventh Circuits have both upheld bans on active solicitation that could disrupt the voting process. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004) (upholding Ohio's 100-foot campaign-free zone that prevented individuals from soliciting signatures on non-ballot related referendum); *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1215 (11th Cir. 2009)

(upholding Florida law that prohibited soliciting signatures, as voters exit the polls, for proposed city charter amendment to be placed on a future ballot).

One of the reasons this Court struck down the sweeping First Amendment activity ban in *Jews for Jesus* is that it would reach considerable non-disruptive speech, including "the wearing of campaign buttons or symbolic clothing"—a ban that could not be justified even in a nonpublic forum. *Jews for Jesus*, 482 U.S. at 575. And just as "[t]he line between airport-related speech and nonairport-related speech" was "at best, murky" in that case (*id.* at 576), the line between "political" and non-political is like a line in the sand on a windy day.

The Oregon Supreme Court wisely summarized the matter:

> The mere passive display of a political button or badge in a polling place does not constitute "improper conduct" of the sort contemplated in Article II, section 8. The silent expression of political opinion is not coercive. To the extent that such expression in the polling place might affect the votes of others, that influence cannot be deemed constitutionally "undue."

Picray v. Secretary of State, 140 Or. App. 592, 600 (1996).

III. THE EIGHTH CIRCUIT RULING EXACERBATES A DANGEROUS TREND TO ESTABLISH "FREE SPEECH ZONES" THAT IMPERIL FIRST AMENDMENT RIGHTS.

The "campaign free zone" in this case resembles the free speech zones that originated on college and university campuses following the student activism of the 1960s. Joseph D. Herrold, *Note: Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 Drake L. Rev. 949, 951 (Summer 2006). Some zones capture only protests. Others attempt to confine all First Amendment activity to a designated area, effectively silencing free speech. Free speech zones should have been laid to rest with this Court's decision in *Jews for Jesus* three decades ago. "On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual 'First Amendment Free Zone' at LAX." *Jews for Jesus*, 482 U.S. at 574. The same is true of free speech zones, yet the practice has spilled over into other contexts, including the world of politics.

These constitutionally questionable speech-free zones have generated a mountain of litigation over the years, with some measurable progress toward their elimination on school campuses.[16] Public universities, widely regarded as the "marketplace of ideas," are one

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[16] *See, e.g.*, https://www.thefire.org/free-speech-zones-then-and-now/ (last visited 12/27/17); *Stand Up for Free Speech Litigation Project*, http://www.standupforspeech.com/about/ (last visited 12/27/17)

of the last places where such government censorship should ever occur. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The zones enable school officials "to keep undesired or unpopular expressive activity out of mainstream campus life." *Capturing the Dialogue*, 54 Drake L. Rev. at 956. In recent years, even political conventions[17] and polling places have followed the trend, creating similar opportunities for officials to abuse discretion and suppress disfavored viewpoints. "Political-free zones . . . create[] an atmosphere that is completely sterilized of any political messaging." *Freedom of Speech & Election Day*, 65 Mercer L. Rev. at 343. In "politically restricted zones" there is more flexibility and "voters are allowed to wear campaign, party, or initiative paraphernalia." *Id.* Minnesota has created a highly restrictive zone using a policy that grants election officials free reign to chill voter expression based solely on the silent messages displayed on the buttons and clothing of voters.

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[17] *Capturing the Dialogue*, 54 Drake L. Rev. at 949 (government-imposed free speech zones widely reported in the media during 2004 Democratic and Republic National Conventions); https://www.aclu.org/news/aclu-sues-city-cleveland-over-rnc-rules-violate-free-speech (last visited 12/27/17).

CONCLUSION

For all of the foregoing reasons, the Minnesota statute should be declared unconstitutional and this Court should reverse the Eighth Circuit ruling.

Respectfully submitted,

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